

Defendant seeks to limit the prosecution's proof of predicate acts to those predicate acts presented to the Grand Jury and which therefore are part of the basis for the Indictment. Adding new predicate acts constitutes a material variance from the Indictment and violates state and federal due process and other constitutional and statutory rights as set forth herein.

THE CHARGING PHASE INVOLVES CONSTITUTIONAL CONSIDERATIONS

1. The Prosecutor Has Broad Discretion but Not Unlimited Discretion

“[T]he district attorney, part of the executive branch, is the public prosecutor charged with conducting all prosecutions on behalf of the People. This function includes instituting proceedings against persons suspected of criminal offenses and the drawing up of informations and indictments. (Gov. Code, §§ 26500-26502.) The discretionary decision to bring criminal charges rests exclusively in the grand jury and the district or other prosecuting attorney [Citation.] ‘The charging decision is the heart of the prosecutorial function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly.’ (A.B.A. Standards Relating to Administration of Criminal Justice (1971) The Prosecution Function, commentary to § 3.9(a).)” (People v. Smith (1975) 53 Cal.App.3d 655 at p. 659.

However, this power is not unlimited. The prosecution must exercise discretion in a rational manner.

“The public prosecutor is vested with discretion in deciding whether to prosecute. (Gov. Code § 2501.) This discretion is broad and quasi- judicial in nature. [Citations.] The discretion exercised is broader than ‘probable cause’ and includes the opinion of guilt, likelihood of conviction, evaluation of legal issues, witness problems, whether the accused is regarded as dangerous, and the alternatives to prosecution.”

People v. Gephart (1979) 93 Cal.App.3d 989, 999-1000)

2. The Need for a Grand Jury Indictment is a Limit on this Discretion

The powers and responsibilities of a Grand Jury are not set forth by statute. At common law, and for many years in this state, an indictment returned by a grand jury was unimpeachable. (People v. Tinder, 19 Cal. 539 [81 Am.Dec. 77]; see In re Kennedy, 144 Cal. 634 [78 P. 34, 103 Am.St.Rep. 117, 1 Ann.Cas. 840, 67 L.R.A. 406]. There is a presumption that the presenting of indictment, indorsed as true bill by its foreperson, has been issued in a lawful manner based upon the rules applying to grand jury proceedings. (People v. Tennant (1939, Cal App) 32 Cal App 2d 1) Over time and by statute ther is limited judicial review for an indictment.

However, there was still great deference given and “[a]n indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. Lorensen v. Superior Court, 35 Cal.2d 49, 56, 59.

By section 995 of the Penal Code, an information, and, since 1949, an indictment, "must be set aside by the court [if the defendant] has been indicated without reasonable or probable cause" or "committed without probable cause."

A CONSTRUCTIVE AMENDMENT BYPASSES THE GRAND JURY AND BYPASSES

JUDICIAL REVIEW

The critical role of the Grand Jury and the limited court review of the Grand Jury process is subverted when a prosecutor constructively amends the Indictment to bring charges not considered by the Grand Jury.

In the present case the *nominal charges* are the same but the basis for the charges are different. This is like charging murder but switching the victim, or materially altering the date of the offense.

A constructive amendment occurs where “the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.” *United States v. Freeman*, 498 F.3d 893, 907 (9th Cir. 2007).

The predicate acts proven before the Grand Jury are elements of the crime charged. Penal Code § 186.22 (a) requires that a defendant have “knowledge that its members engage in or have engaged in a pattern of criminal gang activity”. A person need not be a gang member to be guilty of violating Pen C § 186.22(a), but he must have had more than a nominal or passing involvement with the gang. This means that the defendant knowing of the gang's pattern of criminal activity, must have aided and abetted a separate felony charged in the present case as committed by gang members. *In re Jose P.* (2003, Cal App 6th Dist) 106 Cal App 4th 458.

This “pattern of criminal activity” is a critical element of the charge because gang

membership itself is protected by the First Amendment and only the criminal nature of a particular gang starts the path towards exceptions to First Amendment protections. “Section 186.22 does not punish association with a group of individuals who, in a separate capacity, may commit crimes. Rather, it requires that one of the primary activities of the group or association itself be the commission of crime. The section regulates conduct, not speech or association... one is free to associate with whomever one wishes under the statute, so long as the primary purpose of associating one's self with the group is not to commit crime. **It is not the association with other individuals alone which section 186.22 addresses, but the association with others for the purpose of promoting, furthering or assisting them in the commission of crime.**” (Emphasis added) *People v. Gamez* (1991)235 Cal.App.3d 957 at 971.

The right to simple association is constitutionally protected (*Dawson v. Delaware* (1992) 503 U.S. 161; *Romano v. Oklahoma* (1994) 512 U. S. 1) and more than mere association is required to sustain a gang allegation. *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195.

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*In re Winship*, 397 U.S. 358, 364 (U.S. 1970)) The predicate acts are elements of the crime as defined by the statute. More than that, they are the distinguishing factor that establishes a pattern of criminality that transforms First Amendment protected conduct into potentially criminal conduct. There are date requirements for these acts and only certain types of criminal

conduct qualify.

The prosecution submitted very limited predicate acts to the Grand Jury. The Grand Jury considered these alone and made a determination that these were sufficient to meet the standards of the jury instruction. The jury instruction that was read to the Grand Jury specified the predicate acts.

"Pattern of criminal gang activity" means the commission or attempted commission of or conviction of two or more of the following crimes, namely, assault by force likely to produce a great bodily injury, in violation of Penal Code Section 245 (a) (1) convicted misdemeanor possessing a firearm in violation of Penal Code Section 12021(c)(1).

(Grand Jury 195:16-22)

This means that the only predicate acts considered by the Grand Jury was a 245(a)(1) and a 12021(c)(1). These were proven by the prosecution introducing Exhibit 42 which was Isaac Makinano's conviction of a 245(a)(1) and Exhibit 43, which was Chris Kirkpatrick's conviction of a 12021(c)(1). The prosecution now wishes to redefine this element of the crime by substituting other criminal acts of other people. In doing, so, the prosecution bypasses the Grand Jury and creates a material variance between proof and the Indictment.

THE PROSECUTION CANNOT CONSTRUCTIVELY AMEND THE INDICTMENT

The Fifth Amendment guarantees a criminal defendant "[t]he right to stand trial only on charges made by a grand jury in its indictment." United States v. Garcia-Paz, 282 F.3d 1212,

1215 (9th Cir.2002). After an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself. *Stirone v. United States*, 361 U.S. 212, 215-216, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). As explained in *United States v. Adamson*, 291 F.3d 606, 614-615 (9th Cir.2002):

An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.' ... A variance on the other hand, 'occurs when ... the evidence offered at trial proves facts materially different from those alleged in the indictment.

These new and unrelated predicate acts are “facts materially different from those alleged in the indictment.” This is either a constructive amendment or a variance. A constructive amendment always requires reversal, while a variance requires reversal only if it prejudices a defendant's substantial rights. (*Lopez v. United States*, 2009 U.S. Dist. LEXIS 48174, 27-28 (E. D. Cal. June 8, 2009).

As this motion is being brought pretrial, the distinction should not matter so long as the prosecution is barred from going outside of the crimes submitted as predicate acts to the Grand Jury. However, defendant believes that this is a constructive amendment because we cannot know if the Grand Jury would have indicated on these other predicate acts.

Lopez v. United States, 2009 U.S. Dist. LEXIS 48174, 27-28 (E.D. Cal. June 8, 2009) cites numerous cases where the facts used to prove the crime are so different that there is a

variance or a constructive amendment. The court cites

United States v. Dipentino, 242 F.3d 1090, 1094-5, where the indictment charged defendants with allowing scraped asbestos-containing materials to dry out on floor, instead of placing materials, while wet, into leak proof containers, but jury instruction permitted jury to convict defendants for failing to deposit asbestos containing materials as soon as possible at waste disposal site meeting appropriate federal requirements). This was found to be a constructive amendment.

Lopez cites *United States v. Carlson*, 616 F.2d 446, 447-48 (9th Cir.1980) which found a constructive amendment where the indictment charged the defendant with misapplying bank funds by causing loan to be made for personal use, but the evidence and instructions permitted conviction for misapplying bank funds by causing loan to be made knowing that it was inadequately secured).

It cited *Howard v. Daggett*, 526 F.2d 1388 (9th Cir.1975) which found a constructive amendment where the indictment charged the defendant with inducing two named women to engage in prostitution but evidence and instructions allowed jury to convict defendant of inducing women neither named nor mentioned in the indictment.

The facts in *Howard v. Daggett* are conceptually very close to the facts here. While predicate acts and prostitutes have differences, the concept is the same. Changing the identities of the women changes a key aspect of the crime. Changing the identity of the predicate act,

changes the a key aspect of the crime. The court in *Howard* found the constructive amendment to be a violation of “constitutional dimension”. (*Howard* at 1389)

The *Lopez* court cited various cases where there was variance. It cited *U.S. v. Von Stoll* 726 F.2d at 586 where the variance was that the indictment charged the defendant with 'transporting in interstate commerce \$ 10,000 that was taken by fraud from Ron McCallum but proof and instructions allowed jury to convict defendant of taking \$ 10,000 from McCallum's business partner.

It cited *United States v. Tsinhnahjinnie*, 112 F.3d 988, 990-92 (9th Cir.1997) where the variance occurred when the indictment charged the defendant with sexual abuse of child occurring on Indian reservation during summer of 1992, but proof fluctuated between placing the abuse at place and time in indictment and placing it off reservation in 1994).

In *U.S. v. Olson*, 925 F.2d at 1174-75 there was variance in in a mail fraud prosecution, where indictment charged 'a scheme to defraud and to obtain money' but jury instructions required proof that defendants schemed to defraud by obtaining 'money or property'.

Jeffers v. United States, 392 F.2d 749, 752-53 (9th Cir.1968) (finding fatal variance where indictment alleged that money solicited by religious group was used for non-religious purposes, but evidence failed to prove that use was non-religious, instead showing that use was merely contrary to representations made when money was collected.

A variance or constructive amendment violates the Sixth Amendment right to notice and

the Due Process Clauses of the Fifth and Fourteenth Amendments if it deprives defendant of notice of the offense against which he must defend. Ultimately, the violation is that of the rights inherent in having indictments rendered not by prosecutors but by a Grand Jury. (See: United States v. Shipsey (9th Cir. 1999) 190 F.3d 1081 (instructions that effectively amended the indictment violated the Fifth Amendment's grand jury clause).

In *U.S. v. Stirone* 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960) the defendants were charged with violating the Hobbs Act by interfering with shipments of sand coming into Pennsylvania. *Id.* at 213. The district court, allowed the introduction of evidence that showed interference with the export of steel from Pennsylvania to other states. *Id.* at 214.

The district court also instructed the jury that it could convict if it found that Stirone interfered with sand or steel. *Id.* Interference with commerce is an essential element of a Hobbs Act crime. *Id.* at 218. In many ways that element of the Hobbs Act is similar to the predicate acts requirement in Penal Code § 186.22. It is a jurisdictional element and not an element of the immediate act in question. The interference with commerce element of the Hobbs Act is what gives federal jurisdiction to the crime. The predicate acts are part of the aspect of 186.22 which separates it from First Amendment protections.

In *Stirone* the Supreme Court held that if an indictment alleges interference with one particular kind of commerce, then the conviction must rest on that particular interference and not interference with another type of commerce, "even though it be assumed that under an

indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." Id. Because it was possible the defendant was convicted of a charge that the grand jury did not make against him, the district court in Stirone had fatally erred. Id.

Conclusion

Based upon the above, the prosecution must be limited to two predicate acts, the 120221 allegedly committed by Chris Kirkpatrick and the 245(a)(1) alleged committed by Isaac Makinano. That is what the Grand Jury was instructed on and anything else bypasses the Grand Jury and constitutes an unconstitutional constructive amendment and/or variance.

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